No. 80-954

In the Supreme Court of the United States

OCTOBER TERM, 1980

OSCAR ARBOLEDA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that his Fourth Amendment rights were violated by the seizure of a package of cocaine that he threw onto a ledge outside his apartment.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of possession of 94 grams of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to six years' imprisonment, to be followed by a ten-year term of special parole. A divided court of appeals affirmed his conviction (Pet. App. A-1 to A-27, B-1 to B-3).

1. The facts of the case, as recounted by the court of appeals (Pet. App. A-3 to A-5), are as follows: On April 9, 1979, New York City police officers went to petitioner's apartment for the purpose of arresting petitioner's brother and interviewing petitioner. Two of the officers stationed

themselves at the front door of the apartment, while the third officer, Detective Bisbee, climbed down the fire escape to the second floor, where petitioner's apartment was located. He then climbed from the fire escape onto a two-foot ledge that extended from the building. Detective Bisbee walked along the ledge until he got to the area of petitioner's apartment, where the kitchen window of the apartment overlooked the ledge.

At a pre-arranged time, Detective Bisbee heard a banging noise from the front of the apartment. Petitioner then came to the kitchen window, opened it, and threw an aluminum foil package out the window. The package fell either on the fire escape or on the ledge (see Pet. App. A-4, A-12 to A-13). Detective Bisbee retrieved the package, opened it, and discovered that it contained cocaine. He then banged on the window, announced his authority, and demanded entry. When petitioner ran from the window, Bisbee broke through the window and, after a scuffle, subdued petitioner in a bathroom, where petitioner was attempting to dispose of an additional quantity of cocaine (Pet. App. A-4 to A-5).

2. In the district court petitioner challenged Bisbee's warrantless entry into the apartment. The district court, however, held that the entry was permissible as being effected under exigent circumstances (Pet. App. A-6). On appeal, petitioner abandoned his claim that the entry itself was unlawful and instead claimed that it was Bisbee's seizure of the cocaine from the ledge or the fire escape that violated the Fourth Amendment. The court of appeals rejected this claim on the grounds that petitioner had no privacy interest in the package he had thrown out the window and that he had no privacy interest in the fire escape or the ledge where the package came to rest (Pet. App. A-12 to

A-13).[1] Judge Oakes dissented (Pet. App. A-16 to A-27). In his view, the external ledge was an area in which petitioner had a legitimate privacy interest, and Detective Bisbee's seizure of the package from the ledge therefore violated petitioner's rights under the Fourth Amendment (Pet. App. A-23 to A-27).

3. The decision of the court of appeals is correct, it does not conflict with any decision of this Court or any other court of appeals, and it involves a very narrow Fourth Amendment issue—the extent to which an apartment dweller has a protectable privacy interest in an external ledge of the apartment building accessible to the building's fire escape. There is therefore no reason for this Court to review the decision below.

As the court of appeals found (Pet. App. A-12), petitioner abandoned the package of cocaine when he threw it out the window of his apartment. He therefore retained no privacy interest in the package. See *Abel* v. *United States*, 362 U.S. 217, 241 (1960); *Hester* v. *United States*, 265 U.S. 57 (1924); *United States* v. *Hollman*, 541 F. 2d 196 (8th Cir. 1976); *United States* v. *McLaughlin*, 525 F. 2d 517 (9th Cir. 1975); *Friedman* v. *United States*, 347 F. 2d 697, 702-706 (8th Cir.), cert. denied, 382 U.S. 946 (1965); *United States* v. *Minker*, 312 F. 2d 632, 634-635 (3d Cir. 1962), cert. denied, 372 U.S. 953 (1963). Even if petitioner hoped to retrieve the

[1]The court initially held as well that petitioner had failed to meet his burden of showing that the officers did not have a warrant to arrest petitioner's brother, and that he had therefore failed to show that the entry into the apartment was not justified on that ground (Pet. App. A-6 to A-11). On rehearing, however, the government conceded that the officers did not have a warrant, and the court therefore rested its judgment solely on the fact that petitioner had abandoned any reasonable expectation of privacy in the package of cocaine when he "tossed" it "out the window" and it landed in a public area of the building (Pet. App. B-1 to B-2).

package later, he had abandoned it for Fourth Amendment purposes when he threw it out the window onto the fire escape or external ledge of the building. See *United States* v. *Lewis*, 227 F. Supp. 433 (S.D.N.Y. 1964); *Smith* v. *United States*, 292 A.2d 150 (D.C. Ct. App. 1972).

The court of appeals also properly found that both the fire escape and the ledge were common areas in which petitioner had no legitimate expectation of privacy (Pet. App. A-12 to A-13). As the court noted, there was no evidence that petitioner exercised any exclusive control over the fire escape or the ledge, which were accessible to other tenants of the building from their windows (Pet. App. A-13). Nor was there any indication that petitioner had ever used the external ledge in a private manner as part of his home, or that he had taken any precautions to maintain any privacy interest in the ledge (Pet. App. A-12). See *Rakas* v. *Illinois*, 439 U.S. 128, 141, 149 (1978).[2]

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[2]Even the dissenting judge agreed that if the package had been seized from the fire escape, petitioner would have no Fourth Amendment claim, because the fire escape was clearly a common area in which petitioner retained no privacy interest (Pet. App. A-26 n.5). The majority of the court of appeals found it unnecessary to resolve this factual question, since the majority regarded both the fire escape and the ledge as common areas in which petitioner had no privacy rights (Pet. App. A-13). In light of the dissenter's conclusion that the fire escape was a public area of the building in which petitioner had no privacy interest, it is clear that if Detective Bisbee had remained on the fire escape, he could have seized the package after observing it land in plain view on the

The particular status of the ledge in this case underscored its status as a public area. The ledge ran along the front of the building at the second floor level over a street. In fact, as the court of appeals noted, Bisbee apparently was spotted on the ledge by someone who called the police to report a burglary (Pet. App. A-14). Thus, whatever the case may be with regard to a ledge that is not so readily accessible and so clearly visible to passersby, the ledge in this case hardly constituted a private extension of petitioner's apartment.

Petitioner's argument, in essence, is that Detective Bisbee was on the "curtilage" of petitioner's apartment when Bisbee was standing on the ledge near petitioner's kitchen window (Pet. 13). But as the court of appeals observed, "[t]erming a particular area curtilage expresses a conclusion; it does not advance Fourth Amendment analysis" (Pet. App. A-14).[3] The critical question is whether the owner of property has a legitimate expectation of privacy in a particular area adjacent to his property. If so, an intrusion into that area is unlawful absent a warrant or some other recognized justification, regardless of whether or not the area is termed "curtilage." The court of appeals' fact-bound conclusion that petitioner had no legitimate expectation of privacy in the external ledge outside his apartment does not warrant further review.

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ledge. Because petitioner lost any reasonable expectation of privacy in the package of cocaine when he threw the package out the window, it is immaterial that Bisbee was on the ledge rather than on the fire escape when he retrieved the package.

[3]The dissenting judge below apparently agreed with this observation (see Pet. App. A-24 to A-25).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1981